SUPREME COURT. U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 653

FROHMAN HOLLAND, IRVING HOLLAND, HARVEY MILLER, ROBERT SAUNDERS, BERT GILBERT, on their own behalf and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

RICHMOND KOTCHER, NORTON KOTCHER, DAVID GIMPEL and JACK SACKS,

Intervenor Plaintiffs-Appellants,

MICHAEL W. CAMMAROSANO and EDWARD BRENNAN and all other officers and employees of the Borden Company,

Intervenor Plaintiffs,

against

FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,

Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor Defendant-Appellee.

MOTION TO DISMISS OR AFFIRM ON BEHALF OF FRANK S. HOGAN, DISTRICT ATTORNEY, AND THE ASSISTANT DISTRICT ATTORNEYS OF NEW YORK COUNTY, APPELLEES

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FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,

Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor Defendant-Appellee.

MOTION TO DISMISS OR AFFIRM

Preliminary Statement

In this action for an injunction and summary judgment, plaintiffs sought to enjoin the defendants herein from "invoking, enforcing or executing, in whole or in part, the

applicable statutes [N. Y. General Municipal Law, §103-b] or threatening to do so, including the sending of any notice thereunder or threatening to send said notice or refusing to honor bids invoking any other portion of the applicable statutes." The statutes referred to, Section 103-b of the New York State Finance Law, and Section 2602 of the New York State Public Authorities Law, are similar in nature: Section 103-b of the New York State General Municipal Law, the statute particularly at issue here, is set forth *infra* for the convenience of the Court. Plaintiffs sought the injunction on the ground that the statutes are unconstitutional in that they tend to abridge their rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. Furthermore, they asserted that unless the injunctive relief sought herein was granted, they would suffer irreparable harm and damages which, they contend, could not be adequately compensated at law. Accordingly, this action was brought pursuant to the provisions of Title 42 U.S.C. §1983.

As provided by Title 28 U.S.C. §§2281, 2284, and by order dated April 14, 1967, the plaintiffs' motion for an interlocutory injunction and summary judgment was referred to a three-judge court convened by order of Judge William B. Herlands. The plaintiffs' motion was denied after a plenary hearing by order entered June 27, 1967. A notice of appeal to this Court was thereafter filed with the Clerk of the United States District Court for the Southern District of New York on July 26, 1967.

This Court's jurisdiction is invoked under Title 28 U.S.C. §1253.

The Facts

Heretofore, the Third March 1967 Grand Jury assembled to investigate whether certain corporations (not parties to the instant suit) which regularly sell milk to the City had conspired amongst themselves to prevent competitive bidding on public contracts, and to commit the crimes of extortion, coercion, bribery, and conspiracy in relation to contracts for the sale of milk to various governmental agencies in New York. The plaintiffs, each of whom are officials of those corporations, were subpoenaed to appear before the grand jury and testify under a waiver of immunity. They each refused to execute the proffered waiver, and consequently were notified by the assistant district attorney conducting the investigation of the provisions of Section 103-b of the New York General Municipal Law requiring the District Attorney to forward to the appropriate city and state agencies notification of their failure to sign. Without further ado, plaintiffs were then excused from the grand jury room.

Thereafter, the District Attorney informed the appropriate city and state agencies of the failure of plaintiffs to execute the waivers of immunity and to testify. To date, no milk corporation has been disqualified from doing business with the City of New York, although several state agencies have disqualified various firms. However, the Director of Purchases of the City of New York has, after a hearing before a "Board of Responsibility" at which an employee of the Dairymen's League Cooperative Association had declined to answer several questions concerning

the submission of collusive bids, declared that the Dairymen's League not to be a responsible bidder and accordingly has disqualified it from bidding on a certain contract. This determination has been sustained by the New York State Supreme Court [see *Dairymen's League Co-operative Ass'n, Inc.* v. *Perrini*, —— Misc. 2d ——, 282 N.Y.S.2d 887 (Sup. Ct. N.Y.Co. 1967)].

Presently, the grand jury has completed that phase of its investigation which requires the testimony of persons subject to the provisions of the challenged statute. Therefore, at this juncture the defendant District Attorney does not intend to call any additional witnesses who are executives of milk firms required to testify under waiver of immunity. This representation was made on argument to the court below. Additionally, no notices pursuant to Section 103-b will be posted to any governmental agency, as all of the interested agencies have already been apprised of the plaintiffs' refusal to waive and testify.

The Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V.

United States Constitution, Amendment XIV, Section 1.

Section 103-b of the New York General Municipal Law entitled "Disqualification to contract with municipal corporations and fire districts" which provides as follows:

> "Any person who, when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision there-

of or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

"It shall be the duty of the officer conducting the investigation before the grand jury before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the superintendent of public works of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract."

Section 103-c of the New York General Municipal Law entitled "Removal of disqualification of public contractors by petition" which provides as follows:

"1. Any firm, partnership or corporation which has become subject to the cancellation or termination of a contract or disqualification to contract on account of the refusal of a member, partner, director or officer thereof to waive immunity when called to testify, as provided in sections one hundred three-a and one hundred three-b of this article, may, upon ten days' notice

to the attorney general and to the officer who conducted the investigation before the grand jury in which the refusal occurred, commence a special proceeding at a special term of the supreme court held within the judicial district in which the refusal occurred for an order discontinuing the disqualification. The petition shall set forth grounds, including that the cooperation by petitioner with the grand jury at the time of the refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or corporation by the member, partner, officer or director who refused to waive immunity is such, that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification, as provided in sections one hundred three-a and one hundred three-b of this article."

* * *

POINT I

As no further witnesses will be called pursuant to the challenged statute, the injunction sought would serve no purpose; therefore, the action against the District Attorney and his assistants should be dismissed on grounds of mootness.

Plaintiffs seek the review of an order in which the lower court refused to enjoin the District Attorney of New York County from invoking upon them the provisions of Section 103-b of the New York General Municipal Law. We now represent to this Court, as we have previously informed plaintiffs and the court below, that since April 20, 1967, the grand jury investigation into the milk companies' alleged illicit activities has not required the testimony of any addi-

tional witness covered by Section 103-b. Therefore, the District Attorney will not subpoena any such witnesses before that body, and consequently; of course, will not advise any city or state agency of the failure of any milk dealer to testify or sign a waiver of immunity. The proposed injunction then, at least insofar as the defendant Hogan is concerned, would serve absolutely no purpose.

In making this assertion, we recognize that many cases have held that an action for an injunction does not become moot merely because the conduct immediately complained of has terminated, if there is a possibility of a recurrence which would be within the terms of a proper decree. Thus, in *United States* v. *Trans-Missouri Freight Ass'n,* [166 U. S. 290 (1897)], this Court held that an action to enjoin an association of railroads as an unlawful combination did not become moot when the association was dissolved, since a similar combination might be formed in the future—and indeed actually had been. In the case at bar, however, there is no possibility of a recrudescence of the challenged actions concerning these plaintiffs; in fact, there is not even a claim that it will recur.

In addition, it is indisputable that the District Attorney has no official or unofficial role in the disqualification proceedings, should they occur, other than that described above, *i.e.,* to notify appropriate state and municipal agencies of the refusal of an officer of a contracting firm to testify or waive immunity. His sole duty has long since been performed. Accordingly, inasmuch as defendant Hogan is not charged with either the enforcement or execution of the statute, this action, which requests the enjoining of the disqualification proceedings, should be dismissed as to him on grounds of mootness.

POINT II

This important matter is premature in this Court.

The appellants here challenge a state statute under which they have, as yet, suffered no harm. While notices of their failure to abide by its conditions were forwarded to appropriate municipal agencies, none has evoked the statutory disabilities flowing therefrom against the appellants. Accordingly, in the present case, there has been no opportunity for state tribunals to pass upon the constitutionality of the particular statute which the appellants seek to draw in question. For these reasons, the three-judge court convened below abstained from adjudicating the several issues presented by appellants, on the ground that the statutes involved had not yet been authoritatively construed by the state courts.

The appellants contend that the previously asserted basis for federal abstention has since been dispelled by the recent decision of the Second Circuit Court of Appeals in *Uniformed Sanitation Men's Ass'n, Inc.* v. *Commissioner of Sanitation,* —— F.2d ——, Docket No. 31014, decided September 28, 1967. In that case, the Circuit Court declined to abstain because, prior to that decision, the New York Court of Appeals had in two cases held constitutional provisions similar to those involved in that case and in this [*Gardner* v. *Broderick,* 20 N.Y. 2d 370 (1967); *George Campbell Painting Corp.* v. *Reid,* 20 N.Y. 2d 227 (1967)]. The federal court's refusal to abstain in *Uniformed Sanitation Men,* however, does not affect the soundness of the application of the abstention doctrine by the court below

in the present case. For in the *Sanitation* case, as in the two state cases referred to there, the statute in question had been invoked to disqualify or discharge from office the party plaintiff. Here, by contrast, the statute has not been utilized by any party-defendant to disqualify any plaintiff from contracting with municipal agencies. Instead, as the Corporation Counsel indicated to the court below, the policy of the City of New York is to rely upon an altogether distinct procedure. Rather than automatic disqualification by operation of §103-b of the General Municipal Law, the City is proceeding pursuant to a Resolution of the Board of Estimate [Petitioner's Brief, p. 47], by which hearings are conducted by a "Board of Responsibility" to determine whether any prospective contractor is a "responsible bidder."

The appellants here claim that the proceedings of the Board of Responsibility are the direct outgrowth of the operation of the statute in question, and that through this device, the statute, although not applied according to its terms, has in effect harmed them. They refer to the single instance in which a corporation employing one of the plaintiffs herein was found not to be a responsible bidder, after a hearing, and disqualified from submitting bids on a particular city contract. The decision of the Board in that case was affirmed by a Special Term of the Supreme Court of the State of New York [*Dairymen's League Co-operative Ass'n, Inc.* v. *Perrini*, —— Misc. ——, 282 N.Y.S. 2d 887 (Sup. Ct., N.Y.Co., June 8, 1967)]. But it is clear that the present action cannot be deemed a challenge to the constitutionality of a procedure altogether independent of §103-b. Appellate remedies within the state framework

are, of course, open to the disqualified corporation should it elect to contest further the adjudication. Surely, the present appeal to this Court cannot be regarded as a challenge to that procedure. Moreover, sound principles of comity dictate resort to available state procedures in the first instance. Nor can the decision at Special Term in the *Dairymen's League* case be regarded as state gloss upon the statute challenged by the appellants in the present action.

Thus, the present posture of this case remains precisely as it was below: the challenged statute has not been invoked nor has it been construed by state appellate courts. The fact that a cognate procedure under a different law was utilized to achieve a somewhat similar result does not serve to resolve open questions of state law which pertain to the statute in question. This Court is therefore asked to pass upon the constitutionality of a state statute where the "resolution of the federal constitutional question is dependent upon or may be materially altered by the determination of an uncertain issue of State law" [*Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965); see also, *Davis* v. *Mann*, 377 U.S. 678 (1964); *County of Allegheny* v. *Frank Mashuola Co.*, 360 U.S. 185 (1959)]. Under these circumstances, this Court should defer to state procedures, and await future developments which may ripen the issue for adjudication by this Court or the lower federal tribunals.

In light of the high degree of local interest, it is particularly desirable that the federal courts decline to consider matters which the state tribunals can and will pass upon. In this respect, we note that appellants have raised the

question, at pages 27-8 of their brief, of whether the waiver proffered by the District Attorney was a limited waiver within the scope of Section 103-b. If it was not, then neither the corporations employing appellants, nor the appellants themselves, could be disqualified under the applicable statute. This threshold question must, of course, be resolved in any future attempt to disqualify plaintiffs, and can only be resolved by a state court construing state law.

Further, it is entirely possible that the corporations involved in the present matter will never be formally disqualified by the City from bidding pursuant to the provisions of Section 103-b, but that the City will choose to rely entirely on the above-mentioned "Responsibility Hearing" to determine to whom a contract shall be awarded. This, of course, has nothing whatever to do with the provisions of Section 103-b, and would be adequate state grounds for refusing to do business with these organizations. Thus, the constitutional issue presented need not ever be resolved, and, just as significantly, the resolution of those issues by this Court might be of academic interest only.

POINT III

The disqualification of firms doing business with the City for failure of their officers to cooperate with a grand jury investigation is not repugnant to the Fifth or Fourteenth Amendments to the United States Constitution; moreover, this procedure does not deprive plaintiffs of their Fifth Amendment privilege.

Although, as pointed out above, we do not believe that defendant Hogan and his assistants are a proper party to this action, nor do we consider this Court to be now the proper forum to adjudicate the issues presented, we are grateful for the opportunity here afforded to discuss the constitutional question involved.

The gravamen of appellants' argument is that the statute is unconstitutional in that it compels them to forfeit their Fifth Amendment privilege for fear of economic sanctions. In support of this contention they allege, and for purposes of this argument we do not contest, that they are either major stockholders or highly paid employees whose economic interests would be jeopardized should a disqualification ensue. In brief, they assert that the statute [Gen'l Mun. L., Sec. 103-b] is in all respects analogous to the statutes (or court rules) involved in the *Garrity* and *Spevack* cases [*Garrity* v. *New Jersey*, 385 U. S. 493 (1967); *Spevack* v. *Klein*, 385 U. S. 511 (1967)], and accordingly demand that this Court, in conformity with those decisions, declare Section 103-b to be unconstitutional. The fault in the argument, however, is that the Court in both *Garrity* and *Spevack* expressly forbore deciding the issue presented here. Nevertheless, a close read-

ing of those decisions, as well as a review of the legal principles involved, warrants the conclusion that the statute is constitutional.

To begin with, it is by now abundantly clear from a long line of cases commencing with the oft-cited *Hale* v. *Henkel* [201 U.S. 43 (1906)], that a corporation is not a person within the meaning and protection of the privilege against self-incrimination. Thus, for example, a corporation cannot refuse to surrender its books and records in response to a subpoena on grounds that it would tend to incriminate itself or one of its members [*United States* v. *White*, 137 F.2d 24 (C.C.A.Pa. 1943)]. Without the privilege to withhold incriminating evidence, the corporate contractor cannot complain, on Fifth Amendment grounds, of a term in a contract requiring them to furnish oral testimony concerning corporate actions. The municipal party deprives a corporate contractor of nothing by the insertion of such a term in the contract, or by the enactment of a law to like effect. Recision of the contract for breach is, of course, no greater infringement of constitutional rights, the clause itself being a legal term. Thus, where one party to the contract is a corporation, as here, the *Garrity-Spevack* doctrine, founded on the personal Fifth Amendment right, is inapplicable.

The officer or director, however, might, as happened here, refuse to disclose the requested information on the ground that it tends to incriminate him personally. His right to do so is absolute—he cannot be legally compelled to supply the information which may later be used to convict him without commensurate immunity. On the other

hand, the corporation—*qua* corporation—has clearly failed to fulfil the terms of its undertaking and breached the terms of its contract. Nor can it rely on the employees' privilege in a suit for damages or as a defense to an action to rescind, as the defense is a personal privilege for the benefit of a witness and cannot be claimed for the benefit of another [*Hale* v. *Henkel*, 201 U.S. 43, 51 (1906)].

The appellants' argument here, however, is not that corporations are divested of any constitutional right, but that the statute operates to penalize them as individuals for asserting the privilege by threatening to a greater or lesser degree their means of livelihood. And, their argument continues, the *Garrity* and *Spevack* cases prohibit "any sanction which makes assertion of the Fifth Amendment privilege costly." [*Spevack, supra,* at 515]. Despite the sweeping language of the majority in that case, it must be recognized that the holding was in fact a limited one: all that was decided was that an attorney could not be deprived of that status because of his reliance on the constitutional right of silence. In the present case, neither individuals nor corporations are threatened with the loss of any right or status granted in the first instance by the state.

Deprivation of the privilege of contracting with municipal agencies may occasion financial loss, but there is no legal impairment of the right to continue to do business. The milk dealer's license is not in jeopardy. For this reason alone, *Spevack* is inapplicable here. The contractual relationship here involved is closer to the employer-employee relationship of the *Garrity* decision. And there,

significantly, the five-man majority declined to hold that the state was obliged to maintain the relationship with a party who had refused to testify without immunity. State and federal courts, moreover, have subsequently held affirmatively that the requirement of candid testimony, under waiver of immunity, from public officers and contractors concerning their conduct as such, is reasonable and gives no offense to the Constitution [see, *Gardner* v. *Broderick*, 20 N.Y.2d 370 (1967); *George Campbell Painting Corp.* v. *Reid*, 20 N.Y.2d 370 (1967); *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation*, —— F.2d ——, 2d Cir. Docket No. 31014, September 20, 1967; *United States ex rel. Laino* v. *Warden*, 246 F.Supp. 72 (S.D.N.Y. 1965)]. Significantly, too, Justice FORTAS indicated in his *Spevack* concurrence that he might approve inducing testimony by threat of loss of public trust, if a state employment contract rather than a license is involved. Hence, it would appear that, by analogy of business contract to employment, the disqualification of the plaintiffs' corporations here would meet majority approval in the Supreme Court under the *Garrity-Spevack* doctrine.

The plaintiffs contend that, regardless of the state procedures that may be developed to enforce the provisions of Section 103-b, that statute is unconstitutional because of the threat it contains of possible future economic consequence by reason of an individual's assertion of a constitutionally guaranteed right. But the "threat" of consequence cannot itself be unlawful if the threatened consequence is lawful. Therefore, if, as we contend, there is no constitutional deprivation in the disqualification of a corporate contractor, surely the individual is under no illegal

compulsion by reason of being informed of this fact. And the result, in essence, is as simple as it is reasonable. The City, as a contractor, may exact terms to assure itself that its suppliers are hiding no criminality in their dealings. Lack of satisfaction on this score entitles them to terminate existing contracts and refrain from future dealings with the business enterprises involved. This unquestionably visits a penalty upon the units for failure to disclose information which may incriminate them. But, being without the scope of Fifth Amendment protection, they have no status to complain of the penalty. Similarly, the individuals, officers and directors may refuse, on constitutional grounds to testify to what might incriminate them personally, as they did here. But no consequences are visited upon them personally for such refusal. Their employment contracts with the companies are not directly affected, nor is their right to continue in business. The only economic effect, under the challenged law, is visited upon the corporation with which they are associated, independent entities in law. Secondary consequences which may flow by the corporations' election to sever the disqualifying relationship is not attributable to state action. It is a speculative consideration, and it is surely beyond the state's obligation to protect an individual from a possible decision by his private corporate enterprise predicated upon its independently exercised business judgment.

The allegations of certain plaintiffs herein, that as stockholders they will be injured, are easily rebutted. Obviously, all owners of the enterprise may suffer for the corporation's business reversals. This is a common risk of investment. If the management of the business ineptly or crookedly leads the business to the point where its buyers

forswear further trade, the stockholders suffer. This is true whether the buyer is a state organization or another private concern, and it is true regardless of the reasons for severing further dealings. The stockholders' complaint should be addressed to the management which led it to hard times—not to the buyer who dropped the account.

Thus, in conclusion, the proposition urged as the basis for the assertedly substantial federal question is fundamentally unsound. On the merits of the action, no federally cognizable right is impaired or imperiled, for, as seen, there is no inalienable right either to public service or to be awarded public contracts; both are subject to reasonable conditions such as those exacted by the challenged provision of New York law. Moreover, recent, consistent, and reasonable decisions of this Court, the lower federal courts, and the New York Court of Appeals deprive the question asserted of substantial federal importance. Accordingly, there is no warrant to consider the present appeal.

Conclusion

The order appealed from should be dismissed or affirmed.

Respectfully submitted,

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District Attorney
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November, 1967